BEST AVAILABLE COPY

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Commitment of sexually violent predators is punishment 3

A. The label attached to a sanction does not determine whether it is punishment for purposes of constitutional analysis 3

B. A sanction historically used as criminal punishment, imposed after a finding that the person committed a criminal offense is punishment, except in the rare instance when a civil remedial objective can be shown to be the predominant purpose for imposing the sanction 10

1. Is the sanction historically used as punishment 13

2. Is the sanction imposed for the commission of a crime 14

3. Is the sanction imposed for a predominantly criminal purpose, such as incapacitation, rather than a predominantly civil purpose, such as the treatment of a mental illness 15

C. Because the Kansas Sexually Violent Predator Act imposes incarceration, historically a form of punishment, on the basis of the commission of criminal conduct, and for the purpose of incapacitation, not treatment, it is punishment 17

II. Punishment for acts committed before the enactment of the statute violates the Ex Post Facto Clause 25

III. The Commitment hearing placed Leroy Hendricks at risk of a second punishment for the same offense 26

CONCLUSION 27

TABLE OF AUTHORITIES

CASES **PAGES**

Addington v. Texas, 441 U.S. 418 (1979) . . . . . passim

Allen v. Illinois, 478 U.S. 364 (1986) . . . . . passim

Beazell v. Ohio, 269 U.S. 167 (1925) 25

Bennis v. Michigan, 116 S.Ct. 994 (1996) 10

BMW v. Gore, 116 S.Ct. 1589 (1996) 11

Breed v. Jones, 421 U.S. 519 (1975) . . . . . passim

Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257 (1989) 11

Bullington v. Missouri, 451 U.S. 430 (1981) 26

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 25

California Department of Corrections v. Morales, 115 S.Ct. 1597 (1995) 25

Child Labor Tax Case, 259 U.S. 20 (1922) 14

Collins v. Youngblood, 497 U.S. 37 (1990) 25

Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) . . 4-5

TABLE OF AUTHORITIES (Continued)

CASES	PAGES
Foucha v. Louisiana, 504 U.S. 71 (1992)	1, 16, 17
Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867)	5
In re Gault, 387 U.S. 1 (1967)	5, 6, 12
Heller v. Doe by Doe, 509 U.S. 312 (1993)	20
Humphrey v. Cady, 405 U.S. 504 (1972)	8
Jones v. Thomas, 491 U.S. 376 (1989)	26
Kelly v. Robinson, 479 U.S. 36 (1986)	10
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	passim
Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) (en banc)	23
Liparota v. United States, 471 U.S. 419 (1985)	14
Lipke v. Lederer, 259 U.S. 568 (1922)	5, 14
McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972)	8
Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1939)	7

TABLE OF AUTHORITIES (Continued)

CASES	PAGES
Montana Department of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994)	passim
Morrisette v. United States, 342 U.S. 246 (1952)	14
Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972)	8
Nixon v. General Services Administration, 433 U.S. 425 (1977)	16
Poland v. Arizona, 476 U.S. 147 (1986)	26
Romer v. Evans, 116 S.Ct. 1620 (1996)	22
Specht v. Patterson, 386 U.S. 605 (1966)	passim
State v. Carpenter, 541 N.W. 2d 105 (Wis. 1995)	23
United States v. Brown, 381 U.S. 437 (1965)	16
United States v. Constantine, 296 U.S. 287 (1935)	5, 19
United States v. Halper, 490 U.S. 435 (1989)	4, 5, 27
United States v. LaFranca, 282 U.S. 568 (1931)	5, 14
United States v. Lovett, 328 U.S. 303 (1946)	5

TABLE OF AUTHORITIES (Continued)

CASES **PAGES**

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 3, 5, 26

United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) 4, 20

United States v. Salerno, 481 U.S. 739 (1987) 11

United States v. Ursery, 116 S.Ct. 2135 (1996) . . . . . passim

United States v. U.S. Coin & Currency, 401 U.S. 715 (1971) 14

United States v. Ward, 448 U.S. 242 (1980) 11, 12

Vitek v. Jones, 445 U.S. 480 (1980) 18

In re Winship, 397 U.S. 358 (1970) 6

In re Young, 857 P.2d 989 (Was. 1993) 23

STATUTES

PAGES

18 U. S. C. § 3553 16

21 U. S. C. § 881 13

STATUTES (Continued)

PAGES

United States Sentencing Guidelines, Ch. 1, Pt. A.3, p.s. 16

Ariz. Rev. Stat. §§ 13-4601-4609 7

Ariz. Rev. Stat. § 13-4606(B) 24

Ariz. Rev. Stat. § 13-4607(A) 24

Calf. Welf & Inst. Code §§ 6600-6608 7

Calf. Welf & Inst. Code § 6600(a) 7

Calf. Welf & Inst. Code § 6604 7

Calf. Welf & Inst. Code § 6607 24

Kan. Stat. Ann. 21-3810 18

Kan. Stat. Ann. 21-4716 22

Kan. Stat. Ann. 22-3221 19

Kan. Stat. Ann. 22-3428 19

Kan. Stat. Ann. 59-29a01 . . . . . 23, 25

Kan. Stat. Ann. 59-29a01-16 3

Kan. Stat. Ann. 59-29a02(a) 19

STATUTES (Continued)

	PAGES
Kan. Stat. Ann. 59-29a03	passim
Kan. Stat. Ann. 59-29a04	21
Kan. Stat. Ann. 59-29a07	18, 19, 23
Minn. Stat. Ch. 253B	7
Minn. Stat. § 253B.02, subd. 18b.	7
Minn. Stat. § 253B.09	24
Wash Rev. Code § 71.09	7
Wis. Stat. Ch. 980	7

OTHER AUTHORITIES

	PAGES
American Bar Association, Criminal Justice Mental Health Standards (1984)	9
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Andeneas, J., Punishment and Deterrence (1974)	15

OTHER AUTHORITIES (Continued)

	PAGES
Bedarf, Abril, Comment, Examining Sex Offender Community Notification Laws, 83 CAL. L. REV. 885 (1995)	22
4 Blackstone, William, Commentaries on the Laws of England (21st ed. 1844)	10, 15
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Packer, Herbert, The Limits of the Criminal Sanction (1968) 15

President's Remarks at Signing of Megan's Law, 1996 WL 263016 (May 17, 1996) 22

OTHER AUTHORITIES (Continued)

PAGES

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INTERESTS OF AMICI CURIAE

NACDL is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 to improve the quality of the representation of the accused and to advocate the preservation of constitutional rights in criminal cases. The NACDL has a membership of more than 9000 attorneys and is affiliated with 68 state and local criminal defense organizations, thus it speaks for more than 28,000 criminal defense lawyers across the country. NACDL has filed briefs in many cases before the Court involving the relationship between mental health and criminal liability, including briefs last Term in *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996), and *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996).

NACDL has a keen interest in the preservation of constitutional rights applicable to criminal prosecutions, and is concerned about the erosion of these safeguards by means of statutes authorizing nominally "civil" incapacitation in place of criminal punishment.

The Kansas Association of Criminal Defense Lawyers is the local affiliate of NACDL.

Although *amici* agree with the decision of the Kansas Supreme Court that the Kansas Sexually Violent Predator Act violates the due process clause as well, this brief is limited to the ex post facto and double jeopardy issues presented in the cross-petition.[1]

SUMMARY OF ARGUMENT

In *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992), the Court foresaw that to deem confinement for the purpose of community protection a permissible civil remedy, would " be only a step away from substituting confinement for dangerousness for our present system which, with only narrow

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[1] The parties have consented to the submission of this brief by a joint letter filed with the Clerk. Rule 37.3.

exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." In *Foucha*, the Court was concerned with the use of "civil" incapacitation **instead of** a criminal sentence; in this case, the Court is faced with confinement **in addition to** conviction and punishment. This issue arises here because while Kansas could and did authorize long prison sentences to keep repeat sex offenders off the streets, it could not apply these penalties retroactively or to persons who had already been sentenced. Kansas undoubtedly has a legitimate and important interest in protecting its citizens, and it may use means including long prison sentences to shield the community from dangerous offenders. It may not, however, accomplish this purpose by imprisoning persons who do not suffer from treatable mental illness because they have a proclivity to commit crimes. The Court should reject the State's attempt to lay a "civil" veneer over criminal punishment.

This Court's cases establish the primacy of substance over surface, as we show in Part I.A. When a statute imposes criminal penalties, this Court has not hesitated to disregard labels and apply constitutional standards. Part I.B of this Brief proposes a test for distinguishing civil from criminal sanctions we think fits the Court's precedents and is somewhat easier to apply than -- although compatible with -- the "purpose and effect" and multi-factor *Kennedy v. Mendoza-Martinez* standards the Court has invoked in the past. Because the Kansas SVP Act imposes incarceration, historically a form of punishment, on the basis of a finding that the person committed one or more criminal offenses, and because the statute is primarily for the purpose of incapacitation rather than treatment, we show in Part I.C that it is a criminal sentencing provision in substance. It follows in Sections II and III that the commitment of Leroy Hendricks under the SVP Act violates the ex post facto clause as a retroactive punishment and the

double jeopardy clause as a second "action[] intended to authorize criminal punishment to vindicate public justice." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943).

ARGUMENT

I.
COMMITMENT OF SEXUALLY VIOLENT PREDATORS IS PUNISHMENT.

The Kansas Sexually Violent Predator Act, Kan. Stat. Ann. 59-29a01-16 (the SVP Act), was enacted in order to prolong the imprisonment of sex offenders nearing the completion of their terms of confinement, who could not be subjected to newly increased criminal sentences because of the ex post facto and double jeopardy clauses. The goal of protecting the community against sexual assaults is a legitimate and important one, which States may accomplish by a variety of means, including recidivist sentencing laws designed to incapacitate dangerous repeat offenders. The question presented in this case, most fundamentally, is whether the State of Kansas may circumvent constitutional restrictions on its powers to impose criminal punishment by labeling the punishment a "civil commitment."

A. The Label Attached to a Sanction Does Not Determine Whether it is Punishment for Purposes of Constitutional Analysis.

The Court has applied a two step analysis to determine whether a sanction is subject to constitutional restrictions applicable to criminal proceedings. *United States v. Ursery*, 116 S.Ct. 2135, 2142, 2147 (1996). The first step is to decide whether the legislature intended to create a civil or a criminal

sanction. *Id.* The Kansas legislature doubtless intended to apply a civil label to sexual predator commitments. However, a "legislature's description of a statute as civil does not foreclose the possibility it has a punitive character." *Montana Dept. of Revenue v. Kurth Ranch*, 114 S.Ct 1937, 1945 (1994) (footnote omitted). The second step is to decide "whether the statutory scheme was so punitive either in purpose or effect as to negate [the legislature's] intention to establish a civil remedial mechanism." *Ursery*, 116 S.Ct. at 2142 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984)) (internal quotation omitted). This analysis turns on "the character of the actual sanctions imposed on the individual by the machinery of the state." *United States v. Halper*, 490 U.S. 435, 447 (1989). "In making such an assessment, 'the labels 'criminal' and 'civil' are not of paramount importance.'" *Kurth Ranch*, 114 S.Ct. at 1945 (quoting *Halper*, 490 U.S. at 447).

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866), this Court saw through the civil form of a Missouri constitutional provision intended to punish former Confederates by barring them from the ministry and struck it down as an ex post facto law and a bill of attainder. The Court recognized that the substance of the Missouri law was indistinguishable from one that imposed punishment, although it took the form of a qualification to practice a profession:

> The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by

> the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

Since *Cummings*, the Court has continued to recognize, as Justice O'Connor wrote in her dissenting opinion in *Montana Department of Revenue v. Kurth Ranch*, 114 S.Ct. at 1953, that "the Constitution constrains the State's ability to denominate proceedings as 'civil' and so dispense with the criminal procedure protections embodied in the Bill of Rights." In *Kurth Ranch*, the Court held that a Montana statute -- notwithstanding its form as a tax -- was in substance a second penalty for possessing marijuana, in violation of the Double Jeopardy Clause. Similarly, in *United States v. Halper*, 490 U.S. 435 (1989), the Court recognized that a nominally civil monetary penalty that was entirely disproportionate to the government's asserted civil objective was a second punishment that implicated "the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." 490 U.S. at 447 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. at 554 (Frankfurter, J., concurring)). *Kurth Ranch* and *Halper* are only the most recent in a long line of cases that have disregarded civil labels to prevent evasion of constitutional protections.[2]

The Court has been vigilant against evasion of constitutional safeguards when legislation works a deprivation of liberty. In *In re Gault*, 387 U.S. 1 (1967), and *Breed v.*

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[2] *See, e.g., Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867)(disqualification from the practice of law in federal courts is unconstitutional ex post facto punishment for supporting the Confederacy); *Lipke v. Lederer*, 259 U.S. 568 (1922)("tax" for violating liquor laws); *United States v. LaFranca*, 282 U.S. 568 (1931)(double tax on sale of liquor); *United States v. Constantine*, 296 U.S. 287 (1935)(excise tax on liquor business); *United States v. Lovett*, 328 U.S. 303 (1946) (denial of government employment).

Jones, 421 U.S. 519 (1975), the Court recognized that despite a greater concern for treatment and rehabilitation in juvenile institutions as compared to prisons for adults, "[c]ommitment is a deprivation of liberty. It is incarceration against one's will whether it is called 'criminal' or 'civil.'" 421 U.S. at 530 (quoting *Gault*, 387 U.S. at 50). In *Gault*, the Court held several provisions of the Bill of Rights applicable to juvenile delinquency proceedings, notwithstanding their "civil label of convenience." And, in *Breed*, the Court concluded that a criminal prosecution following an adjudication of delinquency for the same offense violated the double jeopardy clause. *See also In re Winship*, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt in delinquency cases). On the other hand, in *Addington v. Texas*, 441 U.S. 418, 429 (1979), the Court ruled that the criminal procedural protections of the Bill of Rights did not reach commitments for the treatment of the mentally ill under the State's *parens patriae* authority. The Court distinguished the juvenile delinquency cases because Texas confined the mentally ill "only for the purpose of providing care designed to treat the individual." 441 U.S. at 428 n.4.

The Court has, on several occasions, examined State laws providing for the "commitment" of persons who are believed to be dangerous because of a history of sex offenses, but none of these decisions provide implicit or explicit support for the Kansas SVP Act. None of these prior cases concern a statute like the Kansas Act explicitly targeted at extending the imprisonment of persons who have already been prosecuted for, and in most cases convicted of, criminal charges and who are about to be released from custody. The first statute similar to the Kansas SVP Act was enacted by the State of Washington in

in 1990, and to date only four states, in addition to Kansas, have adopted similar, although not identical legislation.[3]

The Court's earlier cases fall into two categories, neither of which fits the Kansas statute here. The first category concern commitments used as an alternative to or diversion from criminal prosecution. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1939), upheld a "psychopathic personality" commitment under a statute directed at persons deemed not responsible for their actions because of their psychological problems. *See Specht v. Patterson*, 386 U.S. 605, 610 n.3 (1966)(discussing and distinguishing *Pearson*). Similarly, the State was required to forego criminal prosecution to pursue commitment proceeding under the Illinois statute in *Allen v. Illinois*, 478 U.S. 364, 369 n.5 (1986). Because "the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement," 478 U.S. at 370, the Court held that commitment proceedings under the Illinois Sexually Dangerous Persons Act should not be deemed "criminal cases" for purposes of the privilege against self-incrimination.

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[3] *See* Wash Rev. Code § 71.09; Wis. Stat. Ch. 980; Minn. Stat. Ch. 253B; Cal. Welf. & Inst. Code § 6600-6608; Ariz. Rev. Stat. § 13-4601-4609. There are some important differences between the Kansas statute before the Court and the laws enacted by other States. As we discuss below, page 24 *infra*, Washington by judicial construction and the other States by explicit enactment, provide for consideration of less restrictive alternatives to secure custody or "conditional release." California also permits commitment only if the person has a "diagnosed mental disorder." § 6600(a). California limits the initial term of commitment to two years, § 6604, rather than placing the onus on the committee to win release. Minnesota's statute makes its general civil commitment law applicable to "sexually dangerous persons" or "sexual psychopaths," rather than creating a commitment scheme limited to already prosecuted sex offenders about to be released from custody. Minn. Stat. § 253B.02, subd. 18b.

The second category consists of statutes providing a dispositional alternative for persons convicted of crimes, but in need of treatment. In these cases commitment as a sex offender is an alternative to ordinary sentencing, rather than an alternative to prosecution. In *Specht v. Patterson*, the Court considered an indeterminate commitment under a Colorado statute applicable to persons convicted of a specified sex offense who "constitute[] a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." 386 U.S. at 607. Persons committed under the Colorado Sex Offender Act could be confined longer than the maximum sentence for the offense of conviction. Finding "[t]he punishment under the Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm," 365 U.S. at 608-609, the Court deemed the proceedings "not unlike" sentencing under recidivist statutes providing enhanced penalties for dangerous repeat offenders, 365 U.S. at 610, and held that the due process clause required a formal hearing before commitment. Similarly, in *Humphrey v. Cady*, 405 U.S. 504, 510 (1972), Wisconsin defended indeterminate confinement under its Sex Crimes Act as "triggered by a criminal conviction . . . [and] merely an alternative to penal sentencing." The Court rejected this sentencing justification as applied to "renewals" of the commitment after the expiration of the maximum sentence for the offense of conviction, and concluded that the differences between commitments under the Sex Crimes Act and commitments for mental illness raised a substantial equal protection question.[4] None of these cases have posed ex post

[4] In *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972), and *Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972) (per curiam), the Court declined to reach issues arising under Maryland's "Defective Delinquency Law." In *Murel*, which involved commitments "in lieu of sentence," the Court dismissed the writ as improvidently granted. *McNeil* ruled six years of confinement, after the expiration of a criminal sentence, for "observation" in conjunction with a commitment proceeding a violation of the due process clause.

facto and double jeopardy questions like those presented here, because none of them have involved efforts to augment punishment already imposed.[5]

The decision in *Allen v. Illinois* -- that the privilege against self-incrimination was inapplicable to a proceeding to commit a mentally ill sex offender for treatment as an alternative to criminal prosecution -- is not controlling here, because the State of Kansas has not "disavowed any interest in punishment, provided for the treatment of those it commits, [or] established a system under which committed persons may be released after the briefest time in confinement." 478 U.S. at 370. To the contrary, the Kansas Supreme Court found it "clear that the primary objective of the Act is to continue incarceration and not to provide treatment." Pet. App. 16a. The Kansas' Supreme Court's conclusion, as well as its finding that "treatment for sexually violent predators is all but nonexistent," Pet. App. 15a, is thoroughly supported by the record. Like juvenile delinquency prosecutions, proceedings under the Kansas act are distinguished from ordinary criminal prosecutions and sentencings only by a flimsy "civil label of convenience," *Breed*, 421 U.S. at 529, which is as important for this Court to strip away as it is easy for a legislature to apply

[5] The scarcity of decisions in recent years is probably due to the trend towards repeal or modification of specialized commitment statutes. *See* American Bar Association, *Criminal Justice Mental Health Standards* 7-8.1, Commentary at 460 nn. 19-20 (1984). The ABA has specifically called for the repeal of "[s]tatutes which provide for special sentencing and treatment of sexual psychopaths, psychopaths, or defective delinquents." Standard 7-8.1 at 455. *See also* Standard 7-9.16 (calling for use of general civil commitment statutes if offenders with mental disorders remain dangerous at the conclusion of a prison sentence).

B. A Sanction Historically Used as Criminal Punishment, Imposed After a Finding that the Person Committed a Criminal Offense, is Punishment, Except in the Rare Instance When a Civil Remedial Objective Can Be Shown to Be the Predominant Purpose for Imposing the Sanction.

In recent years, the Court has looked to the purpose or the effect of a nominally civil sanction to decide whether the sanction should be deemed punishment subject to constitutional safeguards applicable to criminal proceedings. Of the two, the inquiry into purpose is less powerful in identifying criminal punishments mislabeled as civil sanctions because there is a substantial overlap between the purposes of criminal and civil law enforcement. For example, as the Court recently said in *Bennis v. Michigan*, 116 S.Ct. 994, 1000 (1996), deterrence may be an objective of a civil enforcement scheme, just as it is undoubtedly an objective of the criminal law. *See also Ursery*, 116 S.Ct. at 2149. Similarly, rehabilitation is an important aspect of civil "treatment," but it is also compatible with criminal punishment. The rehabilitation of offenders is typically an objective of probation, as well as specialized sentencing schemes such as the old federal Narcotics Addict Rehabilitation Act and Youth Corrections Act. Even restitution and victim compensation requirements are often used to promote the rehabilitation of the offender as well as to compensate the victim. *Kelly v. Robinson*, 479 U.S. 36, 52 (1986)("criminal justice system . . . is concerned not only with punishing the offender, but also with rehabilitating him;" restitution order is not dischargeable in bankruptcy).

Incapacitation has long been recognized as a goal of criminal punishment, *see* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 10 (21st ed. 1844) and other authorities cited at pages 15-16, *infra*, but it is also a goal of civil hospitalization of the dangerous mentally ill,

Addington v. Texas, and the temporary "regulatory" confinement of persons accused of serious crimes and found to be very likely to commit new offenses while pending trial. *United States v. Salerno*, 481 U.S. 739 (1987). Even retribution is encountered in civil proceedings as the reason for awarding punitive damages. *BMW v. Gore*, 116 S.Ct. 1589, 1595 (1996)("[p]unitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition"); *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 275 (1989)("punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law"); *id.* at 297 (O'Connor, J., concurring in part and dissenting in part)(punitive damages are awarded not to compensate, but to punish and deter). For this reason, it is difficult to begin the examination of a statute by asking whether its purpose is exclusively civil or criminal.

Amici suggest that it is preferable to begin the analysis with an objective assessment of the sanction, not only because of the overlap between criminal and civil purposes, but also because some sanctions are inherently punitive. *See Kurth Ranch*, 114 S.Ct. at 1952 (O'Connor, J., dissenting) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)) ("Some governmental exactions are so punitive they may be imposed only in a criminal proceeding"). For example, in *Breed v. Jones*, 421 U.S. at 529, the Court concluded it was "simply too late in the day," to treat as civil for double jeopardy purposes, "a proceeding whose object is to determine whether [the person] has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." A sanction that meets this standard -- as commitment under the Kansas SVP Act undoubtedly does -- can be considered civil notwithstanding its objectively punitive form, only if the State can show, as Illinois did in *Allen*, that it has

"disavowed any interest in punishment." 478 U.S. at 370. Assertions that an objectively punitive sanction is really "civil" because it is for the purpose of treatment should, as the Court said of the juvenile process in *Gault*, "be candidly appraised." 387 U.S. at 21, *quoted in Breed v. Jones*, 421 U.S. at 529.

This proposal is, we think, consistent with the Court's decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), which collected a list of factors the Court had used to decide whether a nominally civil statute was "penal or regulatory in character." 372 U.S. at 168. In *Kennedy*, the Court relied on a legislative history establishing the punitive motivation behind a statute stripping citizenship from persons who had fled the United States or failed to return in order to avoid military service. Before recounting this history, however, the Court listed seven factors which, "are all relevant to the inquiry and may often point in differing directions." 372 U.S. at 169:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

372 U.S. at 168-69. The Court in *United States v. Ward*, 448 U.S. 242, 249 (1980), termed this "list of considerations . . . helpful," although "certainly neither exhaustive nor dispositive." We think the *Kennedy* standards can be distilled

and consolidated into three inquiries that provide a workable test for the purpose and effect of a nominally civil sanction: whether the sanction is historically used as punishment; whether imposition of the sanction is based on a factual determination that the person committed a crime; and whether the otherwise punitive sanction has a predominantly civil purpose.

1. Is the Sanction Historically Used as Punishment?

The first question, whether the statute imposes an affirmative disability or restraint, is a non-issue here. Confinement is clearly an "affirmative restraint." Generally, any case involving a sanction will meet this test, and it therefore plays little independent role in the analysis. The second question, whether the sanction is "historically regarded as punishment," is obviously an important one for several reasons. If the Framers of the Constitution thought of a sanction as punishment, then it is incumbent on the judicial branch to prevent legislatures from evading constitutional restrictions by reconstituting punishments as civil remedies. Moreover, the historical association of a sanction with punishment makes it more than likely that, whatever its label, the sanction is viewed by legislators, by the community, and by the person subjected to the sanction, as punishment. When all concerned regard a sanction as punishment, it is punishment. The importance of history is illustrated by this Court's recent decision in *Ursery*, which relied heavily on the history of parallel civil *in rem* forfeitures and criminal prosecutions in rejecting a double jeopardy challenge to forfeitures under 21 U.S.C. § 881. 116 S.Ct. at 2140-42, 2147. Likewise, the Court noted in *Kennedy v. Mendoza-Martinez*, that "forfeiture of citizenship and the related devices of banishment and exile

have throughout history been used as punishment." 372 U.S. at 168 n.23.

2. Is the Sanction Imposed for the Commission of a Crime?

The third question, whether *scienter* is required, is closely related to whether the behavior already is a crime. A *scienter* requirement was considered strong evidence that the factual predicate for imposing a sanction was a crime rather than a civil wrong, because *scienter* was generally the dividing line between crime and tort as the distinction between the two at English common law evolved.[6] *Scienter* was therefore evidence that a sanction was criminal, when "the behavior to which [the sanction] applies" was not "already a crime." In this case, however, there is no need for an independent inquiry into *scienter*, because the Kansas SVP Act applies only to persons proved beyond a reasonable doubt to have committed a violation of Kansas criminal law. The Court has repeatedly found "[t]hat condition is 'significant of penal and prohibitory intent,'" *Kurth Ranch*, 114 S.Ct. at 1947(citation omitted). *See also United States v. U.S. Coin & Currency*, 401 U.S. 715, 721-22 (1971); *United States v. LaFranca*, 282 U.S. 568, 575 (1931); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922); *Ursery*,

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[6] At common law, a *scienter* requirement was one of the principal features distinguishing a crime from the overlapping tort. *See* 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 373-74 (1966 reprint)(5th ed. 1942); 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 289 (Woodbine ed. 1968). For this reason, when a statute requires proof of scienter, even though there is no such offense in the criminal code, a sanction is likely to be deemed criminal. *See e.g., Child Labor Tax Case*, 259 U.S. 20, 37 (1922)(Congress cannot evade restrictions on its regulatory power over commerce by styling a penalty with a scienter requirement a tax). *Scienter* remains an important hallmark of criminal liability. *See Morrisette v. United States*, 342 U.S. 246 (1952); *Liparota v. United States*, 471 U.S. 419, 426 (1985).

116 S.Ct. at 2144 (noting that "only a person charged with a criminal offense was subject to the tax" in *Kurth Ranch*). When an adjudication means that the person has been found to have committed a crime, it is just as stigmatizing as a conviction, and should be treated as a conviction under the Constitution.

3. Is the Sanction Imposed for a Predominantly Criminal Purpose, Such as Incapacitation, Rather than a Predominantly Civil Purpose, Such as the Treatment of a Mental Illness?

The remaining *Kennedy* inquires relate to the *purpose* of the sanction. In asking whether the sanction will "promote the traditional aims of punishment -- retribution and deterrence," the word "deterrence" is used in its broad sense of promoting crime prevention. Incapacitation is a form of specific deterrence. *See* J. ANDENEAS, PUNISHMENT AND DETERRENCE, 165-81 (1974). It has long been a recognized goal of criminal punishment. Blackstone lists "depriving the party injuring of the power to do further mischief," as one of the ends of punishment. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 10 (21st ed. 1844). *See also* 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW § 2 AT 2 (8th ed. 1880); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 1 AT 2-3 (15th ed. 1993). Incapacitation is widely regarded as an objective of punishment by scientists, *e,g.*, NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978), as well as by contemporary legal scholars, *e,g.*, HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 50-51 (1968); PETER W. LOW, JOHN C. JEFFRIES & RICHARD J. BONNIE, CRIMINAL LAW: CASES AND MATERIALS at 1, 24-26 (1982); WAYNE R. LAFAVE

& AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 9 (1972).[7]

"It would be archaic to limit the definition of 'punishment' to retribution. Punishment serves several purposes: retributive, rehabilitative, deterrent -- and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *United States v. Brown*, 381 U.S. 437, 458 (1965); *accord Nixon v. General Services Administration*, 433 U.S. 425, 476 n.40 (1977). As Justice Kennedy observed in his dissenting opinion in *Foucha v. Louisiana*, "Incapacitation for the protection of society is not an unusual ground for incarceration. '[I]solation of the dangerous has always been considered an important function of the criminal law." 504 U.S. at 99 (quoting *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring); alteration in original). For this reason, the Court in *Specht v. Patterson* deemed confinement under Colorado's sexual psychopath statute "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." 386 U.S. at 608-09.

The last *Kennedy* considerations ask whether an alternative purpose for a sanction has been offered, and whether the sanction is "excessive in relation to the alternative purpose assigned." This latter question addresses the same issue of proportionality between a civil purpose and the severity of a sanction the Court has discussed in its recent opinions in *Halper*, *Austin*, and *Kurth Ranch*. *See Ursery*, 116

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[7] Likewise, incapacitation is a goal of punishment under federal sentencing law, 18 U.S.C. § 3553(a)(2)(C); the federal sentencing guidelines, U.S.S.G. Ch. 1, Pt. A.3, p.s.; the Model Penal Code, § 1.02(1)(b), (2)(a) & Comment. at 21 (1985); the Model Sentencing and Corrections Act of the National Commission on Uniform State Laws § 3-102(4)(i); and the American Bar Association Criminal Justice Standards on Sentencing Alternatives and Procedures, Standard 18-2.5(c)(i).

S.Ct. at 2145-46 (discussing cases). Unlike a monetary sanction, incarceration cannot be apportioned between punitive and remedial goals to determine whether it is excessive. Moreover, as Justice Kennedy observed in *Foucha*, "incarceration of persons . . . is one of the most feared instruments of state oppression," 504 U.S. at 93, and should therefore be subject to the most stringent constitutional regulation. Incarceration, especially when it is imposed after a finding that a crime has been committed, can be deemed civil only when the alternative civil purpose is the *predominant* reason for imposing the sanction.

C. Because The Kansas Sexually Violent Predator Act Imposes Incarceration, Historically a Form of Punishment, On the Basis of the Commission of Criminal Conduct, and for the Purpose of Incapacitation, Not Treatment, It is Punishment.

Once the "civil commitment" label is put aside, the confinement of dangerous sex offenders under the new Kansas statute is unmistakably criminal punishment. The consequences of commitment under the Kansas SVP Act, the factual predicate for commitment, and the procedures leading to commitment, mirror a criminal prosecution. "Commitment is a deprivation of liberty. It is incarceration against one's will whether it is called 'criminal' or 'civil.'" *Breed v. Jones*, 421 U.S. at 530(quoting *Gault*, 387 U.S. at 50). In *Specht* this Court recognized that imprisonment of a sexual psychopath after conviction was criminal punishment, and there is no reason to reach any different conclusion here.

It makes no difference that Leroy Hendricks' legal custodian is the Department of Social and Rehabilitation Services, rather than the Department of Corrections, any more than it made a difference in *Breed* that it was the California Youth Authority that had responsibility for confining juveniles.

A benign label for a custodian is no more determinative of the constitutional reality than a civil label on a statute. Similarly, it makes absolutely no difference that the facility in which Mr. Hendricks is confined is called a hospital rather than a penitentiary. In most jurisdictions, including Kansas, convicted prisoners who need mental health treatment are transferred to "hospital" facilities, but this does not mean they are no longer being punished by confinement. *See Vitek v. Jones*, 445 U.S. 480, 493-94 (1980)(describing additional curtailment of liberty effected by transfer to prison mental hospital).

The Larned Correctional Mental Health Facility houses convicted and sentenced prisoners as well as "committees" under the Kansas SVP Act. It does not house committees under Kansas's general civil commitment law, who must be segregated from "predators" by law. Kan. Stat. Ann. 59-29a07. The actual conditions of confinement also reveal that SVP commitments are punitive. The Department of Corrections is responsible for running the facility, and "committees" share essentially the same living conditions as sentenced prisoners.[8] "Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution." *Breed v. Jones*, 421 U.S. at 530.

There is also no meaningful difference between the substance of a commitment proceeding under the SVP Act and a criminal trial and sentencing. In *Allen v. Illinois*, 478 U.S. at 371, the Court relied on the difference between the type of factual determinations made in a commitment hearing under

[8] Another indication that "commitment" under the SVP Act is equivalent to a criminal sentence is that the same "aggravated escape" statute applies to escapes from custody for SVP evaluation or commitment as applies to prison escapes, but not to escapes from civil hospitalization for mental illness. Kan. Stat. Ann. 21-3810.

the Illinois statute and those made in a criminal trial, referring to its prior decision in *Addington v. Texas*. In this case -- unlike *Allen* and *Addington* – the factual determination the jury is asked to make is essentially a finding of repeated criminal liability. The predicate for commitment is that the person was charged with a specified sex crime Kan. Stat. Ann. 59-29a02(a), and either convicted and sentenced, Kan. Stat. Ann. 59-29a03(a)(1), found not guilty by reason of insanity and confined, Kan. Stat. Ann. 59-29a03(a)(3),(4), or found incompetent to stand trial and confined, Kan. Stat. Ann. 59-29a03(a)(2). Proof of a criminal offense beyond a reasonable doubt is required for conviction, and for involuntary commitment of a person found not guilty by reason of insanity.[9] The SVP Act also explicitly requires such a finding to be made in the case of an untried incompetent defendant as well before proceeding with a commitment. Kan. Stat. Ann. 59-29a07(b). Even more than the tax for possessing marijuana in *Kurth Ranch*, commitment under the Kansas SVP Act "is conditioned on the commission of a crime. That condition is 'significant of penal and prohibitory intent.'" 114 S.Ct. at 1947 (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935)).

By contrast, in *Ursery*, the predicate for *in rem* civil forfeiture was related to the commission of a crime, but historically distinguished from criminal punishments by the fiction that the guilty article, rather than the criminal, is "held guilty and condemned." 116 S.Ct. at 2145 (citation omitted). Moreover, "instrumentality forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of their property." *Id.* at 2150

[9] Under current Kansas law, commitment is based upon the jury's answer to a "special question" asking whether its "not guilty" verdict is based on the lack of *mens rea* due to insanity. Kan. Stat. Ann. 22-3221; 22-3428.

(Kennedy. J., concurring). *See also United States v. One Assortment of 89 Firearms*, 465 U.S. at 363 (forfeiture statute "somewhat broader in scope" than criminal provision).

The elements of proof required for commitment in addition to the commission of a specified offense do not shift the focus of fact-finding from criminal conduct to questions of diagnosis. *See Addington*, 441 U.S. at 427-29. As the State's own expert conceded at Mr. Hendricks' hearing, the "mental abnormality" required for commitment consists of nothing more than repeated deviant sexual conduct. (J.A. 263-64). If a pattern of sex offenses exists, the "mental abnormality" is proved whether mental health professionals can identify any treatable mental condition or not. Nor does commitment really turn in any important way on the ability of an expert in a particular case to predict future behavior. Mr. Hendricks' expert witness, Dr. Logan testified to the unreliability of such predictions. (J.A. 315).[10] The jury was instructed that the statutory standard is "likely" to reoffend; the court declined to elaborate on how great the risk must be. (J.A. 359). Dr. Logan himself acknowledged that "you are not going to expose your kids to a 30% risk." (J.A. 356). Testimony before the Kansas legislature made it clear that the community would expect near certainty before allowing the release of a person who had repeatedly committed sex offenses. Although the statute imposes a rigorous standard of proof beyond a reasonable doubt, this standard applies to the proof of an undetermined, and presumably very low, level of risk. For this reason, it is the pattern of past criminal conduct, not a diagnostic assessment of future conduct by an expert, that dominates the commitment proceeding.

Commitment proceedings under the SVP Act mirror the stages of a criminal case. The petition seeking Mr.

[10] *Cf. Heller v. Doe by Doe*, 509 U.S. 312, 323 (1993) (predictions of dangerousness are inaccurate).

Hendricks' commitment was filed by the same office that prosecuted him in 1984. (J.A. 4-7). Now, responsibility for filing petitions has shifted to the Attorney General, Kan. Stat. Ann. 59-29a04, following review by a committee of prosecutors. Kan. Stat. Ann. 59-29a03(e). This reassignment does not change the accusatorial character of the pleading.[11] A probable cause hearing, not unlike a criminal preliminary hearing follows. If probable cause is found, a trial is held, and either side may demand a jury. The State must prove its case beyond a reasonable doubt. "Compliance with the standard of proof beyond a reasonable doubt is the defining, central feature in criminal adjudication, unique to the criminal law." *Foucha v. Louisiana*, 504 U.S. at 93 (Kennedy, J., dissenting). By contrast, in *Ursery*, the Court observed that by creating "distinctly civil procedures" for forfeitures Congress has indicated clearly that intended a civil, not a criminal, sanction.'" 116 S.Ct. at 2148 (quoting *89 Firearms*, 465 U.S. at 363). In form, the commitment proceeding is therefore "not unlike" a recidivist sentencing proceeding, *see Specht*, 386 U.S. at 610. Proof of one crime, followed by proof of a pattern of similar offenses, leads to a determination that the person should be imprisoned for the safety of the community.

An adjudication under the Kansas statute conveys at least as much "community condemnation" as any criminal conviction. *See* Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 404 (1958) (condemnation is the distinguishing feature of the criminal law). In *Gault*, and again in *Breed*, the Court observed that a juvenile adjudication is almost as stigmatizing as a criminal conviction. But at least juvenile adjudications (at the time) were imposed in closed proceedings and could often be expunged or sealed to protect the juvenile offender from later stigma. Here, the label

[11] The State concedes the recent changes in the statute do not affect its constitutionality. Pet. Br. 1,6.

"sexually violent predator" is affixed in full public view. It is hard to imagine a more stigmatizing label.[12] Indeed, the Kansas legislature used similar words in a parallel criminal statute to describe repeat offenders subject to much longer sentences. Kan. Stat. Ann. 21-4716. By contrast, the commitment statutes in *Minnesota ex rel. Pearson*, and *Allen*, implied a determination that the sex offender bore diminished or no criminal responsibility for his crime as a result of a mental illness.

The remaining question, then, is whether the commitment statute may be justified by the alternative purpose of affording treatment to persons with mental abnormalities. The Kansas Supreme Court found it "clear that the primary objective of the Act is to continue incarceration and not to provide treatment." Pet. App. 16a. We think that determination is entitled to deference, *cf. Romer v. Evans*, 116 S.Ct. 1620, 1627 (1996)(deferring to "authoritative" construction of Colorado's constitutional amendment by its State Supreme Court). But even if the Court were to examine

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[12] The depth of feeling evoked by the label "sexual predator" is evident in the bipartisan and nearly universal support of recent federal legislation requiring convicted sex offenders to register with local law enforcement authorities. *See* President's Remarks at Signing of Megan's Law, 1996 WL 263016 (May 17, 1996); 142 Cong. Rec. S4921-01, 1996 WL 238971 (May 9, 1996)(Sen Dole); 142 Cong. Rec. S4845-01, 1996 WL 233571 (May 8, 1996)(Sen. Dole); 142 Cong. Rec. E732-02, 1996 WL 23360 (May 7, 1996)(Rep. Martini). *See also* Peter Davis, "Rage in Englewood," *The New York Times Magazine* 20-27, 36, 40, 43 (July 28, 1996)(recounting, *inter alia*, the mistaken beating of a person believed to be a sex offender); Abril Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 907-08 (1995)(examples of vigilantism against released sex offenders); Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 N.W.U. L. REV. 788, 824 (1996)(same).

the Kansas statute *de novo*, it would come to the same conclusion.

The court below thought the treatment justification offered for the Act was "disingenuous," Pet. App. 20a, finding that "Hendricks is not mentally ill and the crimes for which he was imprisoned were not the result of mental illness." *Id.* The text of the statute states that ordinary forms of mental health treatment are ineffective for violent sexual predators.[13] Kan. Stat. Ann. 59-29a01. *Cf. Foucha*. 504 U.S. at 82 (no effective treatment for antisocial personality disorder). It adds that "the prognosis for [treatment] in a prison setting is poor." *Id.* Yet treatment in a prison setting is exactly what Kansas has provided.

By definition, commitment under the Kansas SVP Act means confinement in a "secure facility," Kan. Stat. Ann. 59-29a07(a), while ordinarily the level of custody for purposes of treatment under a commitment for mental illness is in the least restrictive setting compatible with the safety of the community.[14] "Conditional release" on terms that are appropriate for a particular individual short of secure confinement is not an option under the Kansas statute, but it was available to committees under the statute before the Court in *Allen*, 478 U.S. 369 n.4, as well as under other recent sex offender commitment laws.[15] Under the Kansas statute, a

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[13] Current data on the efficacy of sex offender treatment are somewhat more encouraging, but inconclusive. General Accounting Office, *Sex Offender Treatment: Research Results Inconclusive About What Works to Reduce Recidivism* 3, 11 (June 1996)(Report to Chair of Subcommittee on Crime, House Judiciary Committee).

[14] *See e.g., Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966)(en banc).

[15] *Compare In re Young*, 857 P.2d 989, 1012 (Was. 1993)(construing Washington SVP statute to require consideration of alternatives to total confinement); *State v. Carpenter*, 541 N.W.2d 105, 110-111 (Wis. 1995)(violent sexual offender statute requires consideration of less

committee can be released from a prison hospital only by showing that he is ready to live in the community ("safe to be at large") without any formal supervision.

The legislative history confirms that treatment was, at best, "incidental" to the purpose of incapacitation. Pet. App. 15a.[16] Proponents of the legislation spoke openly of the hope that "none of them should ever be released," (J.A. 468), and that the statute "would allow us to keep sexually violent offenders locked up indefinitely." (J.A. 478). Even the principal sponsor, who was careful to say the bill was civil rather than punitive in purpose, mentioned treatment only in passing. (J.A. 460). Moreover, the legislature was well aware that mental health professionals doubted the availability of treatment for most sex offenders in general, and the adequacy of treatment resources in Kansas in particular. (*See* J.A. 483-84, 503, 569). The legislature also heard that release under the statute would be a near-impossibility, because although the State bore the burden of proof at a hearing, mental health professionals would not certify the "probable cause" to believe the committee was no longer dangerous and was "safe to be at large" required get a hearing, because of the risk of liability or censure if a committed "predator" committed a new offense after release. (J.A. 483, 509, 567). The Kansas legislature certainly did not expect "committed persons [to] be released after the briefest time in confinement." *Allen*, 478 U.S. at 370.

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restrictive alternatives and permits supervised release); Cal. Welf. & Inst. Code §§ 6607, 6608 (requiring consideration of conditional release in less restrictive setting); Ariz. Rev. Stat. §§ 13-4606(B), 4607(A)(requiring consideration of less restrictive placement during initial commitment and subsequent release hearings); Minn. Stat. § 253B.09 (least restrictive alternative placement).

[16] The same is true of the Washington precursor to the Kansas statute. The background to the adoption of the Washington statute is set forth in the brief of the Seattle-King County Defender Association, et al.

See Kan. Stat. Ann. 59-29a01 (treatment needs "very long term").

Implementation of the statute conformed to the legislature's purpose. The acting clinical director of the program admitted, and the Kansas Supreme Court found, several months after Mr. Hendricks was committed that committees were receiving "essentially no treatment." (J.A. 393); Pet. App. 15a. Even if the State were now to remedy the deficiencies in its treatment program, it would not change the evidence that treatment was at best an afterthought, and that incapacitation was the real purpose of commitment.

The Kansas SVP Act is punitive in design. Criminal sentencing standards are applicable here, just as they were in *Specht v. Patterson*.

II.
COMMITMENT FOR ACTS COMMITTED BEFORE THE ENACTMENT OF THE STATUTE VIOLATES THE EX POST FACTO CLAUSE

The ex post facto clauses of the Constitution forbid both state and federal legislatures from retroactively increasing the punishment attached to a crime. *California Dept. Of Corrections v. Morales*, 115 S.Ct. 1597, 1601 (1995); *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990); *Beazell v. Ohio*, 269 U.S. 167, 169 (1925); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-92 (1798). Because the Kansas SVP Act provides a new punishment, retroactive application of that statute violates the ex post facto prohibition of Article I, § 10, cl.1.

III.
THE COMMITMENT HEARING PLACED LEROY HENDRICKS AT RISK OF A SECOND PUNISHMENT FOR THE SAME OFFENSE.

The Court is accustomed to categorizing claims under the Double Jeopardy Clause as "successive punishment" or "successive prosecution" claims. *Ursery*, 116 S.Ct. at 2139. The harm here could be characterized either way, because it is a paradigmatic violation of the Double Jeopardy Clause. As the Court said in *Breed v. Jones*, "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with criminal prosecution." 421 U.S. at 528. Put another way, jeopardy is the risk of criminal punishment. *See Breed*, 421 U.S. 529 ("the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'") (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. at 548-49). A necessary element of the State's case against Mr. Hendricks was his conviction for sexual offenses in 1984, offenses for which he had already been placed in jeopardy, convicted and sentenced.[17] The commitment is therefore an impermissible second punishment for those offenses. The fact that the second punishment is imposed in a "trial-like" proceeding, *see Bullington v. Missouri*, 451 U.S. 430 (1981); *Poland v. Arizona*, 476 U.S. 147, 154 (1986), implicates the additional "humane interests" injured by a second prosecution.

The central purpose of the Double Jeopardy clause is to "protect[] against the possibility that the Government is

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[17] The imposition of sentence gave Mr. Hendricks an expectation of finality. *See Jones v. Thomas*, 491 U.S. 376, 392 (Scalia, J., dissenting)("the Double Jeopardy Clause is a statute of repose for sentences as well as for proceedings. Done is done").

seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States v. Halper*, 490 U.S. at 451 n.10. That is precisely what the State of Kansas has done here. Having enjoyed the benefit of its plea agreement to a 5-20 year sentence, the State has resolved to get much tougher on repeat sex offenders. While the State of Kansas is undoubtedly entitled to crack down on those it has not yet punished, it cannot add to the penalty it previously imposed on Mr. Hendricks, because that would violate the Double Jeopardy Clause.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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